State of Utah

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DAQ-010-06

MEMORANDUM

TO:	Air Quality Board
THROUGH:	Richard W. Sprott, Executive Secretary
FROM:	Colleen Delaney, Environmental Scientist, and Jim Schubach, Environmental Engineer
DATE:	February 24, 2006
SUBJECT:	Final Adoption: Repeal and Re-enact R307-401, *Permits: New and Modified Sources*

On November 2, 2005, the Board proposed changes to R307-401, *Permits: New and Modified Sources*. A 45-day public comment period was held, and a public hearing was conducted on December 14, 2005. A summary of comments received by UDAQ and the staff response is attached to this memo.

Recommendation: UDAQ recommends that the Board adopt R307-401 with the changes that are described in the response to comments (see attached revision to R307-401).

NSR REFORM RULE - COMMENTS AND RESPONES R307-401

1. **Comment: Some of the permitting definitions that are currently located in R307-101-2 have been moved to R307-401. Changes were made to those definitions in the process that could affect the scope of the rule. The purpose of these changes is not clear. It is also not clear why corresponding definitions were not changed in R307-101-2. It is confusing to have slightly different definitions in the two rules. [Kennecott Utah Copper Corporation]**

Response: One of the goals of the rewrite of R307-401 was to separate requirements that are part of Utah's comprehensive new source review program (minor NSR) from those that are coming from the federal major source NSR program (major NSR). In general, R307-401 uses terms that were adopted as part of the major NSR program so that there is some consistency within the permitting program. The major NSR terms have been used for the broader range of sources and pollutants that are covered under the minor NSR program. The proposed changes to definitions mirror UDAQ's current interpretation of R307-401 as it applies to the minor NSR program, and the changes reflect the broader applicability of the minor NSR program. There were some changes to the definitions to better reflect how these terms have been used in the minor NSR program. UDAQ does not believe that these changes in definitions will affect how the minor NSR program has been historically implemented. In addition, when these definitions were moved to 401 they were realigned with the major NSR definitions whenever possible. Over the years, UDAQ's definitions that were originally based on the federal definitions have been modified to improve grammar or readability. Because the PSD permitting program in R307-405 will now incorporate the federal definitions by reference, UDAQ believed that it was important to match those definitions, to the degree possible, with the corresponding definitions in R307-401. This is important because the minor source and major source programs must operate in parallel. UDAQ does not believe that these changes will affect how the minor NSR program has historically been implemented. The specific changes identified by the commenter are explained below.

a. Actual emissions – The term "pollutant" was changed to "air contaminant" thereby increasing the scope of the definition. The reference to a two-year period was changed to a 24-month period. The provisions that apply to electric utility steam generating units were removed.

Response: These changes do not affect how the rule is implemented. A modification requires PSD review if the increase in actual emissions is significant. For this reason, the term "actual emissions" is very critical to the PSD program. However, under the minor NSR program, the term "actual emissions" is not used to determine whether a modification requires an approval order. Instead, R307-401 requires an approval order if a change is made that "will or might reasonably be expected to increase the amount of or change the effect of, or the character of, air contaminants discharged…" The term "actual emissions" is used only to determine when a source is considered "de minimis" (see proposed R307-401-9). Within this context, language that is specific to electric utility steam generating units and to pollutants that are regulated under the Clean Air Act has no meaning, and was therefore removed from the definition as part of the overall rule clean up. The final point raised about the change from two year period to 24-month period will have no effect within the context of determining if a source is de minimis because a source must continue to stay below the cutoff level in the future to maintain its status as a de minimis source.

b. Construction – the definition has minor editorial changes. Why are these changes made here and not in the corresponding definition in R307-101?

Response: As described above, the changes were made to align the definition with the language that is incorporated by reference in the PSD rule. The changes were not

made to the corresponding definition in R307-101-2 because that definition applies to the major NSR program for nonattainment areas in R307-403. UDAQ has delayed revisions to R307-403 because any changes to that rule are complicated by uncertainties of how NSR will apply for the new NAAQS. UDAQ plans to bring R307-403 to the Board at a later date to address the NSR reform provisions and the new NAAQS and will review the definitions in R307-101-2 at that time to make them consistent with the federal language.

c. Emissions unit – the definition was changed to refer to emissions of "air contaminants" rather than "pollutants subject to regulation under the Clean Air Act." This expands the scope of the definition.

Response: R307-401 applies broadly to "installations" that emit air contaminants. The term emissions unit is used in definitions that were adopted as part of the PSD program. UDAQ has never interpreted the reference to pollutants regulated under the Clean Air Act to limit the applicability of the minor NSR program that comes directly from the Utah Air Conservation Act. The change merely clarifies how the definition has been used for the minor NSR program.

d. Fugitive emissions – the definition has been narrowed to include only emissions which could not reasonably pass through a stack. The current definition describes fugitive emissions as "emissions from an installation or facility which are neither passed through an air cleaning device nor vented through a stack or could not reasonably pass through a stack…"

Response: The definition was changed to match the language that is incorporated in the PSD rule. Within the context of R307-401, there is no change in the implementation of the rule because of how the term is used.

e. "Potential to emit" - the definition was changed to refer to emissions of "air contaminants" rather than "pollutants subject to regulation under the Clean Air Act." This expands the scope of the definition.

Response: R307-401 applies broadly to "installations" that emit air contaminants. The term potential to emit is used in definitions that were adopted as part of the PSD program. UDAQ has never interpreted the reference to pollutants regulated under the Clean Air Act to limit the applicability of the minor NSR program that comes directly from the Utah Air Conservation Act. The change merely clarifies how the definition has been used for the minor NSR program.

f. "Secondary emissions" – the definition was changed to remove language that "secondary emissions must be specific, well defined, quantifiable, and impact the same general area as the source or modification which causes the secondary emissions." This expands the scope of the definition.

Response: The definition was changed to match the definition that was incorporated by reference in the PSD rule. The specific language described above came originally from the major NSR rule for nonattainment areas. It is not clear why this definition is different in that rule. However, in the context of R307-401 there is no effect on

how the program is implemented because the term "secondary emissions" is used only in the definition of potential to emit, that states "Secondary emissions do not count in determining the potential to emit of a stationary source." Within this context, aligning the definition with the PSD definition does not change how the rule is implemented.

g. "Best available control technology" and "indirect source" – these definitions had minor revisions.

Response: The definitions were aligned with the definitions in the PSD rule. The changes were very minor and do not affect implementation of the rule.

h. "Stationary source" and "building, structure, facility, or installation" - these are new definitions. They refer to air contaminants and would expand the scope of the rule.

Response: R307-101-2 contains a definition for the term "source" that combines the two terms "stationary source" and building, structure, facility, or installation" that are used in the PSD rule. In this rulemaking, the terms were separated to match the PSD rule, and this does not affect the usage of these terms. R307-401 clearly applies to installations that emit "air contaminants" rather than being limited to pollutants that are regulated under the Clean Air Act. The applicability language comes directly from the Utah Air Conservation Act. The PSD program, on the other hand, applies only to the narrower group of pollutants. UDAQ has used this broader authority in the minor NSR program to regulate air contaminants that would have a local impact, but are not yet addressed nationally.

UDAQ recommends making some changes to the proposed language in R307-401 to clarify that an approval order is required for "installations" rather than "stationary sources" to conform with the language in the Utah Air Conservation Act. This will ensure that the proposed rule change does not inadvertently change the applicability language that is currently used in R307-401.

2. **Comment: In a number of places in proposed R307-401 and R307-405, when specifying what the executive secretary is to do, the term "shall" has been replaced by the term "will." Does this imply that the executive secretary is not required to take the actions specified in the rule? [Kennecott Utah Copper Corporation]**

Response: The term was changed to reflect the legal authority of the rule. The State cannot regulate itself, and therefore the use of the term "shall" is not appropriate and does not have any greater meaning than the term "will." The rules are intended to regulate sources. However, it is important to describe in the rule how the executive secretary will review applications, seek public comment, etc. If the executive secretary does not follow the process established in the rule, there is not an enforcement action (penalties, etc.) against the executive secretary. However, the underlying statutes (Air Conservation Act, Administrative Procedures Act, etc.) would govern the actions of the State. If the language was adopted into the federal SIP, then EPA could also take action against the State, such as withdrawing approval of the permitting program. If the executive secretary does not follow the established procedures, then any action could be challenged as being an arbitrary implementation of the rule. So, in summary, the terms were changed to

better reflect the legal authority of the rule, but the use of the term "will" does not change the legal obligation of the executive secretary to follow the established procedures.

3. **Comment: In proposed R307-401-14(3), "his representative" should be changed to the "executive secretary's representative," consistent with many other parts of the rules. [Kennecott Utah Copper Corporation]**

   Response: The change has been made as recommended.

4. **Comment: Cross references in R307-401-15(1)(b) and R307-401-16(2) need to be corrected. [Kennecott Utah Copper Corporation]**

   Response: The change has been made as recommended.

5. **Comment: References to temporary relocation in R307-401-9(4) and R307-401-17 (last sentence) need to be updated from R307-401-16 to R307-401-17. [Kennecott Utah Copper Corporation]**

   Response: The change has been made as recommended.

6. **Comment: The requirement in current R307-401-4 to send a copy of the NOI to EPA, local officials, FLMs or Indian Governing Bodies has been removed. [Wasatch Clean Air Coalition]**

   Response: The language referenced by the commentor came from the PSD SIP requirements in 40 CFR 51.166(q) and has been incorporated by reference into R307-405-18. Although the language applied broadly to all NOIs in the current rule, in practice UDAQ has not followed this procedure for minor sources and minor modifications. With the change in the rule, the minor NSR program will operate under Utah public review and comment procedures. There will be no change to the current public notification practices.

7. **Comment: Utah needs to clarify whether removing the requirement for Board approval of permits that consume more than 50% of the increment would impact maintenance of the PSD increments and to state that the provisions is not required by federal regulations. [EPA]**

   Response: The current provision in R307-401-6(3) that requires approval by the Board for a permit that consumes more than 50% of the increment is not required by federal regulations. Removing this provision will not affect maintenance of the PSD increments because 40 CFR 52.21(k), incorporated by reference in R307-405-12, requires that the proposed source or modification would not cause or contribute to air pollution in violation of the increment. Approval by the Board was an additional administrative step that did not directly affect the amount of increment consumed by a project.

8. **Comment: The current rule does not allow a small source exemption for any source that has a potential to emit that would make it a major stationary source. It appears that this provision provides a necessary limit on sources eligible for the exemption and should be retained. [EPA]**

Response: The small source exemption in the proposed R307-401-9 applies to sources with actual emissions that are less than 5 tons/year for any air contaminant or 500 pounds/year of any HAP. These levels are well below the 100 tons/year PTE cutoff for major sources as defined in R307-101-2. It is unlikely that a source with such low actual emissions would have a high PTE. However, if such a source did exist, R307-401-9 requires the source to submit a NOI within 6 months if the source emits more than 5 tons/year of any air contaminant in any year. In addition, the major source permitting requirements in R307-405 and R307-403 are not affected by this exemption, so a major source or major modification would still be required to obtain a permit. The reference to major sources was removed from the small source exemption because it did not provide any added regulatory value, and the definition of major source is complex.

9. **Comment: EPA recommends that small source exemption registry be made mandatory instead of voluntary to maintain an accurate registry and emissions inventory. [EPA]**

Response: The small source registry is essentially a list of all of the sources that are not required to receive an approval order. Under Utah's statute, any source of air pollution could potentially be required to obtain an approval order, but UDAQ has never required extremely small sources, such as an auto parts degreaser at a repair shop or a homeowner's lawnmower, to obtain an approval order. It is not possible to maintain a complete registry because the list of sources would range from those with 4.99 tons/year of emissions to those with 1 pound/year of emissions. EPA does not require a similar registry for national programs. Instead, the national programs focus on the sources that meet the applicability requirements. Under Utah's rules, and national regulations, a source faces enforcement action if they do not comply with a rule if they meet the applicability requirements.

UDAQ has maintained a registry in the non-attainment area, even though it is not complete. However, the registry has been useful for compliance staff because they can determine whether an applicability review has already been completed for a source. UDAQ has found that many sources in attainment areas are already requesting documentation from UDAQ that they qualify for the small source exemption for their own tracking purposes. UDAQ believes that sources will continue to voluntarily register with the state to avoid unnecessary compliance scrutiny, and we will no longer have a regulatory requirement that is not practicably enforceable for very small sources.